No. 2272.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation,

Plaintiff in Error,

vs.

MODERN STEEL STRUCTURAL COMPANY, a Corporation,

Defendant in Error.

BRIEF FOR DEFENDENT IN ERROR

SENECA N. TAYLOR,
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Filed this ..... day of October, 1913.

FRANK D. MONCKTON, *Clerk.*

....., *Deputy Clerk.*

THE BLAIR-MURDOCK COMPANY, 68 FREMONT ST., SAN FRANCISCO

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AMERICAN-PACIFIC CONSTRUCTION COMPANY, a Corporation, *Plaintiff in Error,* vs. MODERN STEEL STRUCTURAL COMPANY, a Corporation, *Defendant in Error.*	No. 2272

BRIEF FOR DEFENDENT IN ERROR

STATEMENT OF THE CASE.

This suit was instituted in the Circuit Court of the United States, Ninth Circuit, Northern District of California, April, 1908, on a complaint filed by defendant in error, hereinafter called plaintiff, against plaintiff in error, hereafter called defendant, claiming damages for breach of contract, in the sum of thirty thousand eight hundred eighty-one and 23/100 dollars ($30,881.23). Defendant was served with process and appeared and demurred to the complaint.

Subsequently various other pleadings were filed in the case, by plaintiff, and by defendant; but the rulings of the court on these, cast no light on the issues before this court, as no exceptions were saved as to such rulings.

June 22, 1911, the plaintiff by leave of court filed a second amended complaint, against the defendant which, omitting the caption, signatures and verification, reads:

> "Comes now the plaintiff in the above-entitled cause, and, by leave of court, files this, its second amended complaint, and avers that at all the times hereinafter mentioned it was and still is a corporation, organized under the laws of the State of Wisconsin, and a resident and citizen of the State of Wisconsin; that at all the times hereinafter mentioned the defendant was and still is a corporation organized under the laws of the State of California, and a citizen of California, and at all of said times having its principal office, residence and domicile in the City of San Francisco in said District and that the matter in dispute in this cause, exclusive of interest and costs, exceeds the sum of twenty thousand dollars.

"AND PLAINTIFF, FOR ITS CAUSE OF ACTION, AVERS:

I.

"That on or about the 19th day of January, 1907, plaintiff and defendant entered into a contract by the terms of which plaintiff agreed with the de-

fendant to furnish material for and to fabricate all the structural steel and iron required by the plans and specifications, as the same then indicated, for the new building to be erected by the defendant for the Richelieu Realty Syndicate, known as the 'Columbia Theatre,' on lot of land situated on the southeast corner of Geary Street and Van Ness Avenue, in the City and County of San Francisco, and to deliver said material, when so fabricated to defendant f. o. b. cars, San Francisco, California, at the agreed price of seventy-seven dollars ($77.00) per ton; that the quantity of such structural steel and iron required for said building about to be erected and which plaintiff sold to the defendant for future delivery was estimated at fifteen hundred (1500) tons and that by said contract plaintiff agreed to deliver all such material to defendant before September 1, 1907.

II.

"That by the terms of said contract defendant purchased from plaintiff for future delivery and agreed to accept from plaintiff the quantity of structural steel indicated and called for by the plans and specifications for said building, which quantity it was mutually agreed between plaintiff and defendant, was about fifteen hundred tons (1500); that said defendant, at said time, was under contract with the owners of said new building for the erection thereof, and defendant agreed to accept from plaintiff and pay plaintiff for all said structural steel and iron seventy-seven dollars ($77.00) per ton upon such deliveries.

III.

"That at all the times mentioned in this complaint, plaintiff owned and operated at Waukesha, Wisconsin, a modern well-equipped factory designed for and used by plaintiff in the fabrication of structural steel and iron of the kind and character mentioned in said contract; that immediately after the execution of said contract plaintiff began carrying out its part of the same and made shop drawings, contracted for raw material out of which to manufacture such structural steel and iron, and fabricated thirty-nine and a quarter (39¼) tons of such material in conformity with the plans and specifications, and forwarded the same to defendant by rail, f. o. b. cars San Francisco, California, which defendant accepted and applied upon said contract, and which tonnage at seventy-seven ($77.00) dollars per ton aggregated the sum of three thousand twenty-one dollars and nine cents (3021.09) and that defendant has wholly neglected and refused to pay the same, or any part thereof.

IV.

"That plaintiff, in all things, kept and performed the stipulations by it to be performed by the terms of said contract until the defendant breached the said contract, as herein stated, and that plaintiff, at all times after said contract was entered into, stood ready, willing, able and anxious to carry out said contract and would have done so had it not been prevented by defendant from doing so.

V.

"That on or about the —— day of April, 1907, defendant ordered plaintiff to do no more work and ship no more material under said contract, as the erection of said building had been abandoned and defendant positively refused to accept any more of said fabricated material if shipped.

VI.

"That defendant has not paid plaintiff anything upon said contract, nor damages for breaching the same, nor for the thirty-nine and a quarter (39¼) tons of structural steel and iron delivered to the defendant and accepted by the defendant on said contract; that had the defendant not breached said contract, plaintiff could and would have carried out said contract and received from the defendant for the fifteen hundred (1500) tons of structural steel and iron aforesaid seventy-seven dollars ($77.00) per ton, or one hundred and fifteen thousand five hundred dollars ($115,500.00); that at the date defendant breached said contract, as aforesaid, and ordered the plaintiff to cease work under it, the cost to plaintiff to have completed said contract in every particular, including the market value of the raw material, labor and freights and the delivery to the defendant of the remaining one thousand four hundred and sixty and three-quarters (1460¾) tons of said structural steel and iron, f. o. b. cars San Francisco, California, would not have exceeded the sum of eighty thousand three hundred thirty-five dollars and eighty-three cents ($80,335.83) and this last de-

ducted from the contract price of one hundred and fifteen thousand five hundred dollars ($115,500.00) would have left a profit accruing to plaintiff of thirty-five thousand one hundred and sixty-four dollars and seventeen cents ($35,164.17); that the items making up said eighty thousand three hundred thirty-five dollars and eighty-three cents ($80,335.83), cost to have completed the said contract, consisted of the following items, to-wit:

"To cost for drawing labor in drawing room	$ 680.72
To cost of shop labor in the factory..	6,871.36
To freights for carrying 1460¾ tons of structural steel and iron from Waukesha, Wisconsin, to San Francisco, California	21,911.25
To cost of rolled material not fabricated, delivered at the factory at Waukesha, Wisconsin, in a quantity sufficient to fulfill the contract —122 tons on hand, balance 1338¾ tons at $38.00 per ton.....	50,872.50
Total	$80,335.83

"That said sum of thirty-five thousand one hundred sixty-four dollars and seventeen cents ($35,164.17) includes the three thousand twenty-one dollars and nine cents ($3,021.09) for the fabricated material above specified which was delivered by plaintiff to the defendant and not paid for by the latter.

VII.

"That plaintiff has been injured and has suffered damages by reason of said breach of said contract by the defendant in the sum of thirty-five thousand one hundred sixty-four dollars and seventeen cents ($35,164.17), in the manner as aforesaid, and that since said contract was breached by said defendant, as aforesaid and before this suit was instituted, plaintiff demanded payment of said damages, but defendant has refused to pay the same, and never has paid the whole or any part thereof.

"WHEREFORE, plaintiff prays judgment for the sum of thirty-five thousand one hundred sixty-four dollars and seventeen cents, together with interest and costs of suit." (Record, pp. 42-43-44-45-46-47.)

Defendant demurred to this complaint, same being overruled, it then filed an answer, but this answer was abandoned and an amended answer to said second amended complaint was filed, which, omitting the caption, signatures and verification, reads:

I.

"Defendant avers it has no information or belief upon the subject sufficient to enable it to answer part of the allegations in the opening part of said second amended complaint, and placing its denial on that ground denies that the plaintiff above named is, or was at all the times herein or in said second amended complaint mentioned, or now is, a corporation organized or existing under or by virtue of the laws of the State of Wisconsin, or of

any other State, or is a resident or citizen of the State of Wisconsin.

II.

"Denies that on or about the 19th day of January, 1907, or on or about any other date, plaintiff and defendant, or plaintiff or defendant, made or entered into any contract; denies that plaintiff and defendant or plaintiff or defendant entered into a contract in substance as, or in any particulars as, or at all as set forth in paragraph 1 of plaintiff's second amended complaint.

"Denies that on or about the 19th day of January, 1907, or at any other time, plaintiff and defendant, or plaintiff or defendant, entered into a contract by the terms of which or by any term of which, plaintiff agreed with the defendant to furnish material for, or to fabricate all or any structural steel and iron, or either, required by the, or any, plans and specification, or either, as the same then or ever, indicated for the new building to be erected by the defendant for the Richelieu Realty Syndicate. Denies that defendant erected or was to erect, or that there was to be erected by it a new building for the Richelieu Realty Syndicate either at the south-east corner of Geary Street and Van Ness Avenue, in the City and County of San Francisco, or elsewhere. Denies that said plaintiff agreed to deliver said or any material when so fabricated, or at any time, to defendant f. o. b. cars San Francisco, California, at an agreed or other or any price of seventy-seven dollars per ton; denies that the quantity of said structural steel and iron or

either required for said, or any, building, about to be erected or which plaintiff sold to the defendant for future delivery, or otherwise, was estimated at fifteen hundred tons, or at any amount whatsoever; denies that plaintiff sold or agreed to sell to the defendant any structural or other steel and iron, or either, for future delivery or otherwise; denies that by said alleged contract or any contract plaintiff agreed to deliver all or any of such, or any, material to defendant before September 1, 1907, or any other time.

III.

"Denies that by the terms of said or any contract, defendant purchased from plaintiff for future delivery, or at all, or agreed to accept from plaintiff the or any quantity of structural or other steel indicated or called for by the plans and specifications, or by the plans or specifications for the building referred to in said second amended complaint, or by any plans and specifications, or plans or specifications; denies that any quantity was mutually or otherwise agreed between plaintiff and defendant, or that the quantity mutually or otherwise agreed between plaintiff and defendant was about fifteen hundred tons, or any tons or amount whatsoever; denies that said defendant at said time was under contract with the owners of said new building for the erection thereof; denies that defendant agreed to accept from plaintiff or pay plaintiff for all said structural steel and iron, or either thereof, seventy-seven dollars, or any other price per ton upon such deliveries or at all.

IV.

"Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations in plaintiff's complaint about plaintiff's ownership and operation of a plant at Waukesha, Wisconsin, and placing its denial on that ground, denies that plaintiff owned or operated at Waukesha, Wisconsin, or elsewhere, a modern or well equipped or any factory designed for or used by plaintiff in the fabrication of structural or other steel or iron, of the kind or character mentioned in said alleged contract, or any contract; denies that immediately or at all after the execution of said or any contract plaintiff began carrying out or carried out its or any of its part of the same or of any contract, or made shop or any drawings or contracted for raw or other material out of which to manufacture such structural or other steel or iron, or anything; denies plaintiff fabricated thirty-nine and one-quarter tons of such or any material in conformity with the said plans and specifications or either or otherwise; denies plaintiff forwarded the same to defendant by rail f. o. b. cars San Francisco, California, or otherwise; denies defendant accepted or applied upon said or any contract, or otherwise said thirty-nine and one-quarter tons or any of such, or any material; denies that said or any tonnage accepted or applied by this defendant or forwarded to this defendant aggregated three thousand twenty-one dollars and nine cents; denies that said or any tonnage was forwarded to, or accepted or applied upon said or any contract or otherwise, by this defendant.

V.

"Denies that plaintiff, in all or any things, kept or performed the stipulations or any of the stipulations by it to be performed by the terms of said contract, or otherwise; denies that plaintiff in all or any things kept or performed the stipulations or any of the stipulations by it to be performed by the terms of said contract or otherwise, until the defendant breached the said contract as herein, or elsewhere stated; denies that this defendant ever breached said or any contract; denies that said plaintiff at all times, or at any time before or after said contract was entered into, stood ready or was ready, willing, able or anxious to carry out said or any contract or would have done so had it not been prevented by defendant from doing so; denies that plaintiff was prevented by defendant from carrying out said or any contract; denies that plaintiff was ready, able, willing or anxious to carry out said alleged or any contract.

VI.

"Denies that at any time defendant ordered plaintiff to do no more work or ship no more material under said or any contract for the reason that the erection of said building had been abandoned or for any reason; denies that defendant positively or at all, refused to accept any or any more or any of said or any fabricated or other material if shipped, or otherwise.

VII.

"Denies that there is or ever was any contract upon or by which defendant was to pay plaintiff anything; denies defendant ever breached said or any contract; denies plaintiff was damaged by any breach of said or of any alleged contract; denies plaintiff ever delivered, or defendant ever accepted said thirty-nine and one-quarter tons or any amount of structural steel or iron on said contract, or otherwise; denies that defendant breached said or any contract; denies that had said alleged contract not been breached, or had not the alleged breach occurred, plaintiff could or would have carried out said or any contract or received from defendant for fifteen hundred tons of structural steel or iron, seventy-seven dollars or any sum per ton, or one hundred and fifteen thousand five hundred dollars, or any other amount; denies that plaintiff could or would have delivered said fifteen hundred tons, or any amount whatsoever.

"Denies defendant breached said contract or ordered plaintiff to cease work under it; denies that at the date it is alleged plaintiff breached said alleged contract, or ordered plaintiff to cease work under it, or at any other time, the cost to plaintiff to have completed in every or any particular either including or excluding the value of the raw material, labor and freights, or any, and the delivery to the defendant of the alleged remaining one thousand four hundred and sixty and three-quarters tons of said alleged structural steel and iron f. o. b. cars San Francisco, California, would not have exceeded the sum of eighty thousand three

hundred thirty-five and eighty-three cents, or would not have exceeded the sum of $84,971.83; denies that there was a contract price or that the contract price was or is one hundred and fifteen thousand five hundred dollars; denies that in any circumstances or under any conditions, plaintiff under or by the performance of said contract would have made, or there would have been a profit of thirty-five thousand one hundred and sixty-four and seventeen cents, but, on the contrary, defendant avers that if plaintiff had fulfilled and carried out said alleged contract, it would have lost a large sum of money, the exact amount of which defendant cannot at this time determine.

"Denies that the items of alleged cost set forth in paragraph VI of said alleged second amended complaint are the only items of cost that plaintiff would have incurred or been under in the performance of said contract; denies that any of the said items correctly sets forth or states the correct cost of the particular amount of said work it is intended to represent, and in this behalf defendant avers that said items are set forth as being correct for the purpose of this case only; denies that said sum of three thousand twenty-one and nine cents represents or is the value of any steel delivered to or accepted by defendant, or not paid for by defendant.

VIII.

"Denies that plaintiff has been injured or has suffered any damage by reason of the alleged breach of said alleged contract or any breach of any contract whatsoever; or has been injured or has suffered damage by reason of said alleged breach

of said alleged contract or of any breach of any contract in the sum of thirty-five thousand one hundred and sixty-four dollars and seventeen cents, or in the sum of thirty-thousand five hundred twenty-eight and seventeen cents, or in any sum whatsoever, either in the manner set forth in said second amended complaint or in any manner whatsoever, or at all.

"Denies that since said or any contract was breached by said defendant or anyone else as alleged in said second amended complaint, or otherwise, or before this suit was instituted, plaintiff demanded the payment or said or any damages; denies the said plaintiff has ever suffered said or any damage; denies that said defendant ever breached said or any contract.

"And for a further and separate answer and defense this defendant avers that the alleged cause of action is barred by the provisions of Subdivision one (1) of Section 339 of the Code of Civil Procedure of the State of California.

"And for a further, separate and second answer and defense, this defendant avers that the alleged cause of action is barred by the provisions of subdivision one (1) of Section 337 of the Code of Civil Procedure of the State of California.

"WHEREFORE, said defendant prays that plaintiff take nothing by its said action and that defendant have judgment for its costs herein incurred." (Record, pp. 62, 63, 64, 65, 66, 67, 68, 69.)

The above are the pleadings upon which this case was tried in September, 1912, before Honorable William C. Van Fleet, District Judge, and a jury, resulting

in a verdict in favor of plaintiff and against defendant, in the sum of $17,372.00, (Record, p. 71) upon which judgment was rendered by the court.

The testimony of respondent consisted largely of depositions taken at Waukesha, Wisconsin, at which Mr. Humphrey, counsel for defendant, was present and cross-examined the witnesses.

THE FOLLOWING PROPOSITIONS OF FACT WERE UNDENIABLY PROVEN AT THE TRIAL:

I.

That at all the times mentioned in the second amended complaint, plaintiff was and still is a corporation organized under the laws of Wisconsin, and a citizen of Wisconsin, and the defendant was and still is a corporation organized under the laws of California, and a citizen of that State, with its principal office in San Francisco, California. (Record, p. 76.)

The defendant, as its name implies, was engaged in contracting for and the erection of buildings; that Thomas Vigus, who constantly figures in the testimony was at the time the contract was entered into, the general manager of the defendant and continued to be such until long after the contract was breached by defendant. (Deposition of Thomas Vigus, Rec., pp. 179-180.)

II.

That William F. Humphrey, chief counsel for defendant, was the Secretary of the defendant and certified to the resolution passed by the Board of Directors appointing Thomas Vigus its general manager. (Record, p. 180.)

III.

That the duties of Thomas Vigus as General Manager of defendant were to transact its general business, estimate cost of construction of buildings and enter into contracts for such construction and superintend the erection thereof. Approximately the amount of business done during the year Mr. Vigus acted as General Manager of the defendant, amounted to about one million dollars. (Record, p. 180.)

IV.

Plaintiff had a written contract with defendant, whereby the plaintiff agreed to furnish and deliver to defendant, f. o. b. cars at San Francisco, at the agreed price of $77.00 per ton, all the structural steel necessary for the construction of the Columbia Theatre Building in San Francisco. This contract, at the caption bears date January 4, 1907, but was accepted and became effective January 17, 1907. It reads as follows:

"PROPOSAL FROM MODERN STEEL STRUCTURAL CO.,

"Waukesha, Wis., Jan. 4, 1907.

"American-Pacific Construction Co., San Francisco, Calif.

"We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner, described as follows and in accordance with the drawings furnished by Jos. D. Smedberg and specifications also furnished by J. D. Smedberg, identified with marks: 'Copy #1,'

Initialed 'S. B. H. 12/30/06,' excepting as noted under 'REMARKS,' on sheet #2 attached.

"Namely, the structural steel and iron (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; Location—southeast corner of Van Ness and Geary St., San Francisco, Calif.

"Delivery: as follows: That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S dated by us on back of print as received Dec. 31, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

"Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working, detail drawings, signed by Mr. Smedberg.

"REMARKS: Our proposition is based on the substitution in part (as referring to 'KIND, CHARACTER AND FINISH OF MATERIALS,' beginning page 9, and 'INSPECTION,' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

"Mill Test Reports, within said specifications are proposed, as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

"We also agree that the tonnage is to be deter-

mined and paid for by certificates from the Western Weighing Asociation at the point of shipment. It is understood that the AMERICAN PACIFIC CONSTRUCTION COMPANY, at their own expense, will weigh same at the Public Scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the American-Pacific Construction Company, the amount overpaid us.

"Price to be seventy-seven ($77.00) dollars per ton; freight allowed to San Francisco, California. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

"Terms of payment as follows: 30 days net cash from date of invoices.

"Payable in New York, Chicago or Milwaukee Exchange, free of expense to us for the collection charges.

"We are responsible for shop errors in work not erected by ourselves and for alterations whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

"When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates, and their expenses, while so delayed.

"This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

"It is expressly agreed that there are no promises, agreements or understandings outside of this contract and that no agent or salesman has any authority to obligate the MODERN STEEL STRUCTURAL COMPANY, by any terms, stipulations or conditions not herein expressed.

"The title and right of possession to all material we furnish remains with the MODERN STEEL COMPANY until the same has been fully paid for in cash.

"This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

"In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.

"Ship via:

"MODERN STEEL STRUCTURAL CO.,

"Accepted January 17, 1907, by S. B. H.

"Approved by S. B. Harding, Pres.

"AMERICAN-PACIFIC CONSTRUCTION CO.,

"Thomas Vigus, Gen'l Mgr."

(Record, pp. 190-194, Rec. pp. 99-102.)

NOTE: Much of the temtimony contained in the Record from pages 77 to 103, related to the execution of the contract, and as plaintiff had lost its duplicate of same, evidence of such loss, evidence of proper search to find same, and then evidence of the contents of such lost instrument. Not till late in the trial was plaintiff furnished by defendant with its duplicate of said contract which last, when produced and when put in evidence, made considerable evidence already adduced, immaterial.

V.

The defendant also furnished to plaintiff specifications for the structural steel for such building which were offered in evidence as plaintiff's Exhibit M. (Record, pp. 106 to 124.) These are headed: "SPECIFICATIONS. THE STRUCTURAL STEEL AND IRON OF AN EIGHT STORY OFFICE BUILDING THEATRE, to be erected on the southeast corner of Van Ness and Geary St., for the RICHELIEU REALTY SYNDICATE, San Francisco, California. FRANK T. SHEA, Architect, San Francisco, JOSEPH D. SMEDBERG, Consulting Engineer, San Francisco."

Also certain plans, as prepared by the architect, were delivered to the plaintiff by the defendant, and Smedberg, the consulting engineer, went to Waukesha, Wisconsin, where plaintiff's rolling mills were situated, to expedite the approval of the shop drawings, as prepared by the plaintiff for the structural steel of the building in question.

VI.

That immediately after the contract was executed the plaintiff proceeded with the work of preparing working drawings and ordering and fabricating steel. Such drawings consist of 31 sheets of tracing cloth, and were identified and offered in evidence at the trial. (Record, pp. 124-125.) There was also offered in evidence 28 sheets of detail drawings for the structural steel for the Columbia Theatre Building, prepared by plaintiff; and there were identified and put in evidence 69 sheets of onion skin paper containing a list of material, concerning these Mr. Harding testified:

> "They relate to the detail drawings heretofore handed you, representing material required as for the respective sheets of drawings. They, in turn, serve as a requisition from which orders are placed with the rolling-mill for the steel."
>
> "These exhibits of drawings and material list were all gotten out after the contract was executed. And we then ordered a large quantity of steel to be fabricated at $38.00 a ton delivered at Waukesha. The rolling-mill paid the freight." (Record, p. 126.)

Mr. Harding, continuing his testimony, stated:

> "Mr. Smedberg was the representative of the architect and he approved the details which have been offered in evidence. We fabricated and shipped to the defendant 39¼ tons of steel. That shipment was made the first of March, 1907, on car No. 45,373 of the Chicago & Northwestern and was consigned to the American-Pacific Construction

Co., at San Francisco, California. The total weight of the structural steel shipped was 78,470 pounds, or approximately 39¼ tons, and at $77.00 per ton, its value would be $3,021.09." (Record, p. 127.)

VII.

The plaintiff stood ready, able and willing to carry out its contract with the defendant. It had equipment for carrying out the contract and abundance of shop room. (Record, p. 128.) But on April 8, 1907, defendant breached the contract and notified plaintiff by telegram to stop all shipment and all work on the Columbia Theatre job until further notice. (Record, p. 132.) This telegram was followed by a letter dated April 9th, addressed to plaintiff, signed American-Pacific Construction Company, per Thomas Vigus, General Manager, confirming the telegram ordering all work to stop. (Record, p. 132.)

Defendant wired plaintiff thus:

> "San Francisco, Cal., April 8th, 1907. Stop all shipments and all work in Columbia Theatre job until further notice. (Signed) American-Pacific Const. Co."

April 13, 1907, defendant wired plaintiff thus:

> "San Francisco, Cal., Apr. 13, 1907. Wire us immediately outside figures settlement Columbia including steel in transit and everything."

April 13th, defendant wrote plaintiff thus:

"San Francisco, Cal., April 13, 1907.

"Modern Steel Structural Co.,
"Waukesha, Wisconsin.

"Gentlemen:— COLUMBIA THEATRE.

"We have to confirm our telegram of even date, as per confirmation herewith.

" 'Wire us immediately outside figure settlement Columbia including steel in transit and everything.'

"The Columbia Theatre people have decided not to finish the structural steel. They are getting up a lot of new stockholders to erect a different kind of building. It is rumored on the street (whether it is founded on facts or not, I do not know) that Messrs. Ruef and Schmitz, who are now indicted by the Grand Jury and are likely to go to jail within a very short time for a term of years (which the people of San Francisco have to congratulate themselves for) were indirectly connected with the Columbia Theatre.

"We expect to receive your wire to-morrow stating exactly how much expense you have been put to in this matter, including the cost of the two cars in transit. We will then take up the matter of a full settlement with you and get them off our hands. I have requested them to take up with Mr. Smedberg his position in the matter, and they have no doubt wired him what to do.

"Yours very truly,
"AMERICAN-PACIFIC CONSTRUCTION CO.,
"Per Thomas Vigus, Genl. Mgr."

(Record, pp. 135-136.)

April 16, 1907, plaintiff wired defendant thus:

> "American-Pacific Const. Co., 536 Coke St., San Francisco, Calif., Cancellation price theater steel $30,230.00, which represents our irretrievable loss if job not completed." (Record, p. 138.)

Thus it is manifest the contract was breached by defendant and plaintiff was not permitted to go forward and furnish the structural steel.

NOTE: Considerable correspondence ensued between plaintiff and defendant endeavoring to get at a basis of settlement for the 39¼ tons of steel delivered and the damages for breach of contract, but nothing resulted from this effort to compromise the matter, and afterwards suit was begun.

VIII.

The testimony tends to show that it would have required 1,500 tons of structural steel, to have erected the Columbia Theatre, with structural steel, as indicated by the specifications and plans for that building. (Deposition of S. B. Harding, Record, p. 130.)

Fred Hoffman was a structural engineer, thoroughly familiar with the plans and specifications for the building in question, and he testified that in his judgment it would have taken 1,500 tons of structural steel for the job. (Record, pp. 177-178.)

F. W. Harding, a practical estimator of the quantity of steel required for buildings, who was thoroughly familiar with the contract and specifications in the case

at bar, testified that it would have taken all told, in his judgment, approximately 1,500 tons of steel to have erected the building in question. (Record, pp. 182 and 226-227.)

And indeed, the estimate before the contract was executed, by the defendant's general manager, Mr. Vigus, and the architect and engineer, was to the effect that it would require at least 1,400 to 1,500 tons. (Record, p. 130.)

IX.

The deposition of Samuel B. Harding shows what it would have cost the plaintiff per ton for the steel from the rolling mills delivered at its plant at Waukesha, and also the cost to have fabricated the same, including paint and transportation to San Francisco.

In substance he testified that it would have cost for shop labor in fabricating the steel, $4.80 a ton, and no more; that it would have cost for the total detailed drawings, for the 1,500 tons, $1,350.00, of which all except $682.50 had already been incurred when the contract was breached; that it would have cost for freight to San Francisco on the steel not shipped, $15.00 per ton; that it would have cost for steel delivered by the rolling mill, f. o. b. cars Waukesha, $38.00 per ton, or $55,508.50 for the remaining 1,460¾ tons not furnished on the contract. (Record, pp. 152-153.) That it would have cost for paint for the tonnage not furnished, $375.00; that it would have cost for fuel oil, $72.00; for paint brushes, $63.00; for punches, $35.00;

in all $695.00. (Record, p. 154.) Mr. Harding reaches the result that after deducting all elements of cost that it would have still incurred in order to have delivered f. o. b. cars San Francisco, the remaining 1,460¾ tons of structural steel, it would have left a profit in favor of plaintiff of over $30,000.00. (Record, p. 156.)

During the taking of this deposition, Mr. Humphrey inquired of Mr. Taylor, counsel for plaintiff, the theory of plaintiff's case, thereupon Mr. Taylor responded.

> "MR. TAYLOR: The theory contended for by the plaintiff is explicitly stated in the petition. It is that there was a contract for the structural steel to be furnished as mentioned in the petition; that the plaintiff was ready, able and willing to carry out that contract; that it proceeded to do so until it was prevented and hindered by the defendant; and therefore the plaintiff is entitled to recover the contract price of the total amount it was to have furnished, less what it would have cost the plaintiff to have completed the contract, including raw material, shop labor, journeymen labor, and freights." (Record, p. 157.)

Mr. F. W. Harding was present at the trial and testified before the jury as to what it would have cost plaintiff to have completed and delivered at San Francisco f. o. b. cars the remaining 1,460¾ tons of structural steel for the job in question.

A careful adding of these items aggregates $85,775.00. Now, 1,500 tons of steel at $77.00 a ton, the

contract price, would amount to $115,500.00. The careful computation of Mr. F. W. Harding shows that there was evidence before the jury which would have justified them rendering a verdict in favor of plaintiff in the case at bar for $29,725.00.

The defendant offered no evidence contradicting the execution of the contract nor its breach. It called four witnesses, to-wit, Mr. Breite, Record, pp. 233 to 240; Peter Zucco, Record, pp. 240 to 242; C. H. Snyder, Record, pp. 242 to 246; and John D. Galloway, Record, pp. 247 to 253. These witnesses testified as to the amount of structural steel indicated by certain plans, and also as to the cost of fabrication, which was in conflict with the testimony offered by plaintiff on these two topics.

Prior to the closing of the evidence in the case and before the argument to the jury was begun, defendant's counsel handed to the court 15 written instructions (Record, pp. 256 to 262), all of which instructions the court refused to give, and thereupon the court charged the jury as follows:

> "THE COURT: Ordinarily, I would not submit the case to you at this hour, but we are rather short of jurors on the panel, and I may need your services in another case in the morning. It strikes me that this case is a very simple one not only in its facts, but in regard to the law, and I have an idea that you will be able to reach a verdict without difficulty and without remaining out over night, or any considerable period into the night. My

hesitation about submitting a case to the jury late in the day is that possibly they might get tied up and have to stay out all night. I know that is very unpleasant, but I do not apprehend any such result will follow in this case, so I will submit the case to you now. Give me your attention.

"This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication and delivery of structural steel. With the nature and terms of that contract you have been made familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict, and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on.

"Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications, or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution, to the extent the specifications and drawings had been furnished, and that plaintiff, at the direction and request of defendant, had entered upon its execu-

tion, so that, for all purposes affecting the rights of the parties here involved, the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant, the action of the defendant, as disclosed by the correspondence between the parties, and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence, in finding against either the execution of the contract by the parties, or its breach by the defendant as counted upon.

"This leaves, as I have said, but one substantive question for your consideration, and that is the question of damages.

"The rule or measure of damages which may be recovered for the breach of a contract such as this is the difference between the consideration stipulated to be paid under the contract for its performance, and the cost of such performance. That is to say, under the contract in suit, the damages plaintiff will be entitled to at your hands, is the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to

the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost it to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth. That interest I would suggest to you will be at the legal rate of seven per cent under the law of this State.

"The question of the amount of damages plaintiff has suffered, being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence; that is by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is, the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against a less number, or other evidence satisfying your minds. The direct evidence of one witness who is entitled to full faith and credit is sufficient to prove any fact in a case such as this.

"The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and,

secondly, the probable gross quantity of steel, in tons, it would have required to complete the building. Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material, and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, $77, the difference or result will be the profit which plaintiff would have made on the contract, and which would represent the damages which, under the law, it would be entitled to recover.

"In figuring the cost to plaintiff of fabricating the steel in question, the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments, without regard to this particular work, should not be taken into account unless you find that such item of general expense in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract; but the jury should include in the items of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant.

"The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages, with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

"You will understand, as stated, that reasonable certainty in the respect mentioned is all that is re-

quired; plaintiff is not called upon to prove his case to a demonstration. The evidence is all before you, and it is for your consideration alone. It is the duty of the Court to state the law, and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is any conflict or controversy; and with that function it is not the province of the Court to interfere.

"You must be certain, however, that your verdict is based upon the evidence, and is not the result of arbitrary desire, on the one hand, or of surmise or speculation on the other.

"The Clerk has prepared forms of verdict for you, gentlemen of the jury, which you will make out in this case as indicated to you by my instructions. When you have reached a conclusion you will report to the Court. As it has been suggested, the plaintiff will be entitled to some verdict at your hands, so the other form of verdict which the clerk has drawn up will not be required, and all that it will be necessary for you gentlemen to do is to fill in the amount of damages which you may find in favor of the plaintiff. You will bear in mind that in the Federal Court the verdict of the jury must be unanimous, and cannot be by a less number as in the State courts. You may now retire, gentlemen of the jury."

After the Court gave the foregoing charge to the jury, and before the jury retired, the following colloquy took place between Mr. Humphrey and the Court:

"MR. HUMPHREY: All instructions given by the Court of its own motion, all instructions requested

by the defendant and refused, and all instructions given by the Court at the request of the plaintiff are deemed excepted to, are they not?

"THE COURT: We do not follow that practice here, but if you think that applies here, all right.

"MR. HUMPHREY: That will be the general exception that we take as given by the statute of the State. We except to all instructions given at the request of the plaintiff, all instructions given by the Court of its own motion, and all instructions requested by the defendant and refused or modified by the Court.

"THE COURT: You will have to take your chances on that. I don't know that that applies in this Court. (Then to the jury the Court said): You may retire, however, gentlemen. If that is the idea of counsel, all right.

"MR. HUMPHREY: That is the exception we desire to take."
(Record, pp. 267-268.)"

The Bill of Exceptions fails to show any proper exception saved as to the refusal of the instructions requested by counsel for defendant, or as to the giving of the charge by the Court to the jury. It is a fundamental rule that an exception under the Federal practice, cannot be saved in the manner pursued by defendant's counsel.

POINTS AND AUTHORITIES FOR RESPONDENT.

Point I.

> "The rule or measure of damages which may be recovered for the breach of a contract such as this, is the difference between the consideration stipulated to be paid under the contract for its performance, and the cost of such performance." (Record, p. 264.)

The trial court having announced this rule elaborated it thus:

> "That is to say, under the contract in suit, the damages plaintiff will be entitled to at your hands, is the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost it to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth."

This was the charge of the trial court as to the measure of damages and such charge is correct. (Record, p. 264.)

Hinckley v. *Pitts Messmore Steel Co.,* 121 U. S. 264;

Boiler & Tank Co. v. *Machine Co.,* 55 Fed. l. c. 453; opinion by Dallas, C. J., and cases cited;

Horst v. *Roehm,* 84 Fed. Rep. l. c. 570;

Kingman & Co. v. *Western Mfg. Co.,* 92 Fed. (Ct. of App. 8th Cir.) l. c. 489;

Hale v. *Trout,* 35 Cal. 229;

Winans v. *Sierra,* 66 Cal. 61;

Tahoe Ice Co. v. *Union Ice Co.,* 109 Cal. l. c. 249;

Ahlers v. *Smiley,* 163 Cal. l. c. 205.

In this last California case, the Court said:

"The rule of damages in such cases is the difference between the cost of manufacture and the contract price. (*Hale* v. *Trout,* 35 Cal. 229; *Winans* v. *Sierra,* 66 Cal. 61.) Loss of profits which are the natural result of a contract and which the law implies from a breach may be recovered without allegations of special damage."

Berthold v. *Const. Co.,* 165 Mo. 304;

Hammond v. *Beeson,* 112 Mo. 198;

Crescent Mfg. Co. v. *N. O. Nelson & Co.,* 100 Mo. 325;

Lumber Co. v. *Warner,* 93 Mo. 374;

Little v. *Mercer,* 9 Mo. 218;

Brand v. *Schuchmann,* 60 Mo. App. l. c. 72;

Halpin v. *Manny,* 57 Mo. App. l. c. 61;

Madison v. *Mayor of Brooklyn,* 7 Hill, 72;
Baker & Co. v. *Mfg. Co.,* 42 N. Y. Supp. 76;
Fairfield v. *Jeffries,* 68 Ind. 578;
Silberstein v. *Duluth Co.,* 68 Minn. 430;
U. S. v. *Speed,* 75 U. S. 77;
Eckenrode v. *Chemical Co.,* 55 Md. 51;
Singleton v. *Wilson,* 85 Tenn. 344;
Railroad v. *Shirley,* 45 Tex. 356;
Fath Co. v. *Tate,* 105 Ky. 701;
Tufts v. *Weinfeld,* 88 Wisc. 647;
Muskegan Co. v. *Keystone,* 135 Pa. St. 132;
Williams v. *Lumber Co.,* 118 N. Car. 928.

The contract was in writing and executed by the duly authorized agent of the defendant. Much correspondence recognizing its validity took place after it was signed and delivered. The breach of the contract was also in writing, consisting of several letters of defendant ordering plaintiff to cease work under the contract, because the erection of the building had been abandoned, and requested plaintiff to state the amount of its damages for the cancellation of the contract. Considerable correspondence ensued between the parties concerning the amount of plaintiff's damages.

Now as the execution of the contract was evidenced by writing, and its breach evidenced by writing, and not a scintilla of evidence offered by defendant contradicting such execution or breach, it was proper for the court to assume the existence of the contract obligatory upon the defendant, and its breach by the defendant.

"It is well settled that the trial court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or defendant, as the one or the other may be proper, where the evidence is uncontradicted, or is of such a conclusive character that the court in the exercise of sound judicial discretion would be compelled to set aside a verdict in opposition to it."

Railroad Co. v. *Converse,* 139 U. S. 469, l. c. 472;

Union Pac. Ry. Co. v. *McDonald,* 152 U. S. 262;

McGuire v. *Blount,* 199 U. S. 142, l. c. 147, held:

"It is strenuously urged that whatever the merits of the controversy there was sufficient proof to require a trial judge to submit the case to the jury, but no rule is better established in this court than that which permits a presiding judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict. It is clear that where the court would be bound to set aside a verdict for want of testimony to support it, it may direct a finding in the first instance and not await the enforcement of its view by granting a new trial." Citing *Elliott* v. *Ry. Co.,* 150 U. S.. 245; *Union Pac. Ry.* v. *McDonald,* 152 U. S. 262; *County Commissioners* v. *Beal,* 113 U. S. 227; *Railroad* v. *Converse,* 139 U. S. 469.

It would have been idle for the trial court to have

submitted to the jury, whether the contract pleaded was actually entered into between plaintiff and defendant, or as to whether the same was breached by the defendant. The evidence as to both propositions amounted to a demonstration, and there was no evidence offered by the defendant tending to contradict this demonstrative evidence introduced by plaintiff.

Point II.

Other parts of the charge of the court to the jury are full, clear, accurate and tenable, leaving nothing unsaid which the court ought to have said, in order, properly to instruct the jury as to the law governing the case.

The charge as given by the court, in scope, precision and clearness is to be commended by this Court. (Record, pp. 262-267.)

No valid exception was saved by counsel for the defendant as to the charge given by the court. The following colloquy, however, occurred between Mr. Humphrey, counsel for defendant, and the court:

> "Mr. Humphrey: All instructions given by the court of its own motion, all instructions requested by the defendant and refused, and all instructions given by the court at the request of the plaintiff are deemed excepted to, are they not?
>
> "The Court: We do not follow that practice here, but if you think that applies here, all right.
>
> "Mr. Humphrey: That will be the general exception that we take as given by the statute of the State. We except to all instructions given at the

request of the plaintiff, all instructions given by the court of its own motion, and all instructions requested by the defendant and refused or modified by the court.

"THE COURT: You will have to take your chances on that. I don't know that that applies in this court. You may retire, however, gentlemen. If that is the idea of counsel, all right.

"MR. HUMPHREY: That is the exception we desire to take." (Trans. of Record, pp. 267-268.)

Now, this colloquy amounted to no exception at all, which this Court will consider.

POINT III.

WHERE THE COURT INSTRUCTS THE JURY IN A MANNER SUFFICIENTLY CLEAR AND SOUND AS TO THE RULES APPLICABLE TO THE CASE, IT IS NOT ERROR TO REFUSE TO GIVE OTHER INSTRUCTIONS ASKED BY COUNSEL ON THE SAME SUBJECT, EVEN THOUGH THEY MAY CONTAIN CORRECT PROPOSITIONS OF LAW.

Humes v. *U. S.*, 170 U. S. 210;
Railroad v. *Cody*, 166 U. S. 606;
Agnew v. *U. S.*, 165 U. S. 36;
Rio Grande etc. Ry. Co. v. *Leak*, 163 U. S. 280;
Mining Co. v. *Cheeseman*, 116 U. S. 529;
Smith v. *Fields*, 105 U. S. 52;
Railroad Co. v. *McCarthy*, 96 U. S. 258;
Railroad Co. v. *Horst*, 93 U. S. 291;
Woodruff v. *Hough*, 91 U. S. 496;
Klein v. *Russell*, 19 Wallace 443.

THE REFUSAL TO GIVE A PROPER INSTRUCTION WHICH WOULD HAVE AVAILED THE PARTY NOTHING, THE JUSTICE OF THE CASE NOT BEING AFFECTED THEREBY, DOES NOT AFFORD SUFFICIENT GROUND FOR A REVERSAL OF A JUDGMENT.

Sullivan v. *Mining Co.*, 143 U. S. 431;
Hartranft v. *Langfield*, 125 U. S. 128;
Railroad Co. v. *Jurey*, 111 U. S. 584;
Railroad v. *O'Leary*, 93 Fed. Rep. 737.

It is submitted that the court instructed the jury in a manner sufficiently clear and sound as to the rules of law applicable to the case. Therefore even if counsel for defendant had requested instructions sound as propositions of law, their refusal would not have been error.

POINT IV.

IF THE ENTIRE CHARGE IS EXCEPTED TO, OR A SERIES OF PROPOSITIONS CONTAINED IN IT ARE EXCEPTED TO IN GROSS, AND ANY PORTION OF WHAT IS EXCEPTED TO IS SOUND, THE EXCEPTION CANNOT BE SUSTAINED.

THE ATTENTION OF THE COURT MUST BE DISTINCTLY CALLED TO THE PORTIONS OF THE CHARGE EXCEPTED TO BEFORE THE FINAL SUBMISSION OF THE CAUSE TO THE JURY.

McDermott v. *Severe*, 202 U. S. 600;
Holloway v. *Dunham*, 170 U. S. l. c. 619-620;
Thiede v. *Utah Terr.*, 159 U. S. 510-522;
Newport News & Miss. Valley Co. v. *Pace*, 158 U. S. 36-40;

Railroad v. *Mackey,* 157 U. S. 72;
Iron Co. v. *Blake,* 144 U. S. l. c. 477-78;
Block v. *Darling,* 140 U. S. 234-239;
Ins. Co. v. *Smith,* 124 U. S. l. c. 424;
Life Ins. Co. v. *Raddin,* 120 U. S. 183-197;
U. S. v. *Hough,* 103 U. S. l. c. 72. In this case the opinion was written by Miller, J., who at page 72, said:

"Before this, however, the district attorney had asked of the court a charge consisting of four propositions which are set out and 'which instructions' says the bill 'the court refused to give, and the district attorney excepted.' According to the well settled rule of this court, if either of these four propositions was erroneous, or, in other words, if all the charge thus asked was not sound law, the court did right in refusing the prayer which presented them as a whole." Citing many authorities.

Partridge v. *Boston & M. R. Co.,* 184 Fed. 211;
Coney Island Co. v. *Dennan,* 149 Fed. 687;
Montana Min. Co. v. *St. L. Min. & Mil. Co.,* 147 Fed. Rep. l. c. 906. Decision by the 9th Cir. Ct. of App; opinion by Morrow, C. J.;
St. L. I. M. & S. Ry. Co. v. *Spencer,* 71 Fed. 93. Decision by Cir. Ct. of App., 8th Cir.

Point V.

Prior to the closing of the evidence in the case and before the argument to the jury began, defendant re-

quested the court, in writing, to give the jury fifteen instructions. (Record, pp. 256-262.) The request was made in bulk, and not as to each instruction separately. The court refused to give said instructions, and thereupon the court proceeded to charge the jury as shown in the Transcript of Record, pages 262 to 267, and at the close of said charge counsel for defendant indulged in the colloquy with the court as hereinbefore stated.

Now, no exception other than as stated in this colloquy was taken with reference to the giving of the charge by the court, nor of its refusal to give the fifteen instructions requested by the defendant. It follows that there was no valid exception saved as to the charge given by the court to the jury nor its refusal to give defendant's fifteen instructions requested in bulk. See authorities under Point IV of this brief, and particularly the following cases:

Union Ins. Co. v. *Smith,* 124 U. S. l. c. 424;
U. S. v. *Hough,* 103 U. S. l. c. 72;
Worthington v. *Mason,* 101 U. S. 149;
Iron Co. v. *Blake,* 144 U. S. l. c. 477-78;
Conn. Mut. Life Ins. Co. v. *Union Tr. Co,* 112 U. S. 250;
Burton v. *Ferry Co.,* 114 U. S. 474;
Thiede v. *Utah Terr.,* 149 U. S. l. c. 520, held:

"The remaining assignments of error relate to the matter of instructions. It appears that at the close of the testimony the defendant presented a body of instructions in 22 paragraphs, and asked

> the court to give them to the jury. They were marked 'Refused as a whole except as given,' and the only exception to such refusal was in this language: "the defendant excepts to the refusal of the court to give the instructions requested by the defendant, being numbered 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 21.' Such an exception is insufficient to compel an examination of each separate instruction. It is insufficient that any one of the series is erroneous. In *Beaver* v. *Taylor,* 93 U. S. 46-54, this precise question is presented, and the court said: 'The entire series of propositions were presented as one request; and if any one proposition was unsound an exception to a refusal to charge the series cannot be maintained.' (See, also, *Indianapolis & St. Louis R. R. Co.* v. *Horst,* 93, U. S. 291-295; *Block* v. *Darling,* 140 U. S. 234; *Bogk* v. *Gassert,* 149 U. S. 17, 26; *Holder* v. *U. S.* 150 U. S. 91; *Hickory* v. *U. S.,* 151 U. S. 303, 316; *Allis* v. *U. S.,* 155 U. S. 117; *Newport News etc. Valley Co.* v. *Pace,* 158 U. S. 36.)

The above cases are cited by the court in support of the paragraph quoted. Many other authorities might be cited to the same effect.

Bates on Federal Procedure, Vol. 2, pp. 804-805, reads:

> "Every 'bill of exceptions ought to be upon some single point of law;' and every exception to the court's charge should be addressed to some separate, distinct and specific proposition of law contained in it; and if there be, in the opinion of counsel, more than one unsound proposition of law em-

braced in the court's instructions to the jury, he should make each one of them the subject of a specific, distinct and separate exception, and, if overruled by the trial court, he should take a separate bill of exceptions, complete in itself, to the court's ruling upon each exception. The court's charge most usually contains a series of independent, substantive propositions of law, or instructions to the jury, applicable to the different issues of fact involved in the case; and it is well settled that, it is the duty of a party or his counsel, excepting to such a charge or series of propositions or instructions, to except to them specifically, 'distinctly and severally,' and to call attention of the court to the specific propositions of law that are deemed erroneous, and where they are excepted to in mass the exception will be overruled, if any one of the propositions be correct. The language of the decisions and the rules of the appellate courts is to the effect that: exceptions to the charge must be specific and not general; and that the trial court is entitled to a distinct specification of the matters of law to which exception is made; and that the attention of the court should be 'specifically called at the time to any particular part of the charge that,' is 'deemed erroneous,' and that 'it is the duty of counsel excepting to propositions submitted to the jury to except to them distinctly and severally;' and that 'the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts.' The undoubted rule is, that each proposition of law deemed erroneous should be made the subject of a distinct and separate ex-

ception, and embodied in a separate bill of exceptions, sufficient in itself to present to the appellate court, upon writ of error, the 'single point of law.'"

COMMENT ON THE DEFENDANT'S INSTRUCTIONS REQUESTED.

INSTRUCTION 1 (Record, p. 280): Though the drawings were a material part of the contract and same were not as a whole completed, this would not make the contract void, because the drawings, yet uncompleted, would simply bear on the quantity of steel to be furnished and not upon its character, and both parties agreed to treat the contract as binding and plaintiff proceeded under it until the defendant breached it.

INSTRUCTION 2 (Record, p. 281), was properly refused by the court; first, there never was a third amended complaint filed in the case; second, because the undisputed evidence showed that plaintiff had delivered 39¼ tons of the structural steel at $77.00 per ton, amounting to $3022.75, for which the defendant had paid nothing. Now, under Instruction 2, unless plaintiff had established by a preponderance of the evidence every proposition contained in the first paragraph of the supposed third amended complaint, a thing which was never filed, the defendant could escape the payment for the actual tonnage of steel received and appropriated. Such cannot be the law.

INSTRUCTION 3 (Record, p. 282), was properly re-

fused because it was covered by the full and complete charge given by the court to the jury.

INSTRUCTION 4 (Record, p. 282), was properly refused because the charge given by the court to the jury covered the whole case. Not only so, but the statement contained in said instruction is vicious as a proposition of law. It would have told the jury that if they were unable to find from the evidence the cost of the minutest item of plaintiff's expense in the performance of the contract the verdict must be for the defendant. Such proposition is not the law.

INSTRUCTION 5 (Record, p. 283), is vicious in toto as a proposition. It manifests a misconception of the rule of damages for recovering in the case at bar. The charge given by the court states the proper theory on which the action was based and the theory applicable to a case of this type.

INSTRUCTION 6 (Record, p. 283), so far as applicable to the case at bar is covered by the charge given by the court.

INSTRUCTION 7 (Record, p. 284), is vicious as a proposition of law and was properly overruled by the court. Not only so, but the jury was fully instructed on all the issues by the court.

INSTRUCTION 8 (Record, p. 284), was fully covered by the charge given by the court so far as it embodies a correct statement of the law. It is quite difficult to understand why counsel should embody in his instruction

"said alleged contract," when before the trial was concluded, counsel, as secretary of the American-Pacific Construction Company, produced the contract fully executed by both parties.

INSTRUCTION 9 (Record, p. 284), was properly refused because it asserts an erroneous theory of the case. It is not a question whether the plaintiff was free for other transaction and that had nothing to do with the quantity of damages plaintiff was entitled to recover. The court in its charge states the proper theory on which the action was brought as shown by the second amended complaint and that theory is the only sound theory on which the case at bar could have been tried.

INSTRUCTION 10 (Record, p. 285), states a theory of law foreign to the case at bar and had no application to the principles of law affecting the rights between the parties.

INSTRUCTION 11 (Record, p. 285), states abstract propositions of law, but the principles involved in Instruction 11 were given by the court in its charge to the jury.

INSTRUCTION 12 (Record, p. 286), will not stand the test of legal analysis. It might be that the jury were in doubt as to the total amount of damages suffered by the plaintiff and therefore not allowing plaintiff the full amount of damages claimed, but that instruction tells the jury that if any doubt at all exists in the mind as to the total amount of damages plaintiff sustained, then

the defendant would be entitled to appropriate to its own use the 39¼ tons of steel which it received and used and pay nothing therefor. Such a proposition is so manifestly unjust that it never could be law.

INSTRUCTION 13 (Record, p. 286), so far as embodies any correct legal propositions was covered by the charge by the court. The overwhelming and uncontradicted evidence in the case shows that plaintiff would have made a profit had it been permitted to perfrom the contract and there isn't a scintilla of evidence contradicting this proposition. To have placed Instruction 13 before the jury would have tended to confuse rather than enlighten the jury how to reach a just verdict.

INSTRUCTION 14 (Record, p. 287), would have cast doubt on the question in the mind of the jury whether there was or was not a contract. It would also have told the jury if they could not arrive at mathematical exactness as to the amount of damages plaintiff sustained, then the judgment should be for the defendant, and the defendant be permitted to appropriate to its own use without paying therefor the 39¼ tons of steel and escape all damages for the breach of the contract, notwithstanding the testimony convinced the jury that the plaintiff was damaged to the amount of $17,372.00. Further, it sought to put before the jury the false theory, viz., that the damages claimed were speculative and remote.

INSTRUCTION 15 (Record, p. 288), was an attempt to enlighten the jury on what is meant by preponderance of the evidence. The court dealt with this matter, and said:

> "The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages, by satisfactory evidence; that is, by evidence which produces moral certainty in your minds as unprejudiced persons, and when there is any conflict in the evidence, it must preponderate in favor of the plaintiff, that is, the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against a less number, or other evidence satisfying your minds," etc.

Most, if not all, of the foregoing instructions are erroneous as propositions of law; and since they were offered in bulk, the court was justified in refusing to give them, and the record utterly fails to show any valid objections and exceptions touching the refusal to give said instructions.

REPLYING TO THE EXCEPTIONS SAVED BY THE AMERICAN-PACIFIC CONSTRUCTION COMPANY.

Exception 1 (Record, p. 76).

It was not reversible error for the court to permit Mr. Harding to answer the question, whether or not the Modern Steel Structural Company had a written contract with the American-Pacific Construction Company, with reference to furnishing the structural steel for the building known as the Columbia Theatre in San Francisco. When that question was propounded in the taking of his deposition it was objected to by Mr. Humphrey, as follows: "The question is objected to as leading and suggestive; not the best evidence and calling for a conclusion of the witness as to whether or not there is a written or any contract." Immediately after, the witness answered the question: "It did" He then proceeds to state that his company's copy of the contract executed by the defendant had been lost, but that he had a copy of the contract executed by the defendant and later in the testimony such copy was introduced in evidence.

It developed, however, very late in the trial, that during all of this time, the duplicate of the contract entered into between plaintiff and defendant was in the possession of the defendant's secretary Mr. Humphrey, counsel who was making these objections. On written notice served on the defendant to produce its copy of said con-

tract the same was produced late in the trial, and was offered in evidence, as will appear by the record (pp. 190-194).

Now, when this original contract was offered and read in evidence this is what Mr. Humphrey said:

> "MR. HUMPHREY: Of course I do not yield that this is a contract. Otherwise we make no objection."

The duplicate copy was offered and read in evidence without objection and it remained for the trial court to construe its legal effect, and the trial court in its charge to the jury, at page 263, said:

> "Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications, or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished, and that plaintiff, at the direction and request of defendant, had entered upon its execution, so that for all purposes affecting the rights of the parties here involved, the contract is to be regarded as having been duly executed."

If there was error in the first instance in permitting the witness to answer the question on page 76 of the record, it was not prejudicial error. It was a harmless error, and when the original contract produced by the defendant was put in evidence, it established that there was a contract which in the first instance plaintiff sought to prove in the only way open for it to prove the same, it having lost its duplicate copy.

EXCEPTION 2 (Record, p. 99).

The second exception relates to the overruling of an objection to the admission in evidence of a copy of the lost contract. As stated before, the plaintiff had lost its duplicate contract and had not at that time been furnished with defendant's duplicate. It therefore introduced as evidence a copy of the lost contract, and a number of letters tending to show that the contract had been executed by the defendant. It has been urged by the defendant that the court erred in admitting such copy of the contract in evidence, and that there was a fatal variance between it and the allegations of the second amended complaint. The second amended complaint averred that the deliveries of the steel were to have been made before September 1st. The copy of the contract admitted in evidence read:

> "Balance of steel shipments to be sixty to ninety days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg."

This was not a material variance under the decisions of the Federal courts.

McDonnell v. *State of Nebraska,* 101 Fed. Rep. l. c. 177;
United States v. *LeBaron,* 71 U. S. 642;
Pope v. *Allis,* 115 U. S. 363;
Moses v. *United States,* 166 U. S. 571, l. c. 579-580;
Grayson v. *Lynch,* 163 U. S. 468.

In this last case the court said:

> "While cases may doubtless be found to the effect that descriptive allegations of this kind must be proved with great strictness, the tendency of modern authorities is to hold that no variance between pleadings and the proof offered to sustain it shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defense on the merits. (Citing authorities)."

And in the same case at pages 478-479, the court said:

> "In *United States* v. *LeBaron,* 71 U. S. 4 Wall, 642-648, it is said that allegations of time, quantity, value, etc., need not be proved with precision, that a large departure from the same is allowed; that the same rule also applies to allegations of place."

The alleged variance between the second amended complaint and the contract under the California Code and decisions was immaterial.

California Code of Civil Procedure, Chapter VIII, Section 469, reads:

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually mislead the adverse party, to his prejudice in maintaining his action or defense to the merits. Whenever it appears that a party has been so mislead, the court may order the pleading amended, according to such terms as may be just."

Section 470 reads:

"When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

Cobb v. *Daggett*, 142 Cal. l. c. 144;
Lyles v. *Perrin*, 134 Cal. 417-18;
Holt v. *Holt*, 120 Cal. 67-69;
Santa Monica L. & M. Co. v. *Hege*, 119 Cal. 377-380;
Knox v. *Higby*, 76 Cal. 268.

The above cases hold that where there is a variance between the allegation and the proof, if it be such as not to mislead the defendant, such variance is immaterial and should be disregarded by the trial court.

It is our contention that there was no error on the part of the court, technical or otherwise, in admitting said copy of the contract at that stage of the proceeding, but if there was, it was non-prejudicial and affords no ground for reversing the judgment.

Not only so, but if it was an error at that time, it was waived when the original contract was offered in evidence, and counsel for defendant, Mr. Humphrey, stated: "Of course, I do not yield that this is a contract,

otherwise, we make no objection." (Record, p. 194.)

The rights of the parties could not be affected as to whether the agreed time of delivery was before September 1st or was sixty to ninety days after all the details had been approved. That question was not one upon which the rights of the parties hinged at all, and therefore it was immaterial.

EXCEPTION 3 (Record, p. 104)

Exception No. 3 relates to testimony bearing on the fact that the original contract had been executed by the defendant, and on January 15th, a duplicate copy so executed was sent by defendant to the plaintiff, and that the witness, Mr. S. B. Harding, thereupon put the number on the contract in his own handwriting, which number indicated the acceptance of the contract.

This question was then asked:

> "Q. Does it indicate the acceptance of the contract?
>
> "MR. HUMPHREY: I object to the question as leading, calling for the conclusion of the witness and irrelevant, incompetent and immaterial."

The objection was overruled and exception taken by the defendant, which exception defendant hereby designates as "Exception No. 3."

The witness answering further, says:

> "It indicates that I, on receipt of that letter and enclosure gave the job a number, and contract as it were, through which it would be known in our

plant by number. That is the custom whenever we receive an accepted contract, to at once give it a number."

It is impossible to conceive how this explanation of Mr. Harding prejudiced the defendant's case. Not only so, but general objections in those sweeping words are not sufficient for the basis of the objection which if overruled will form grounds for reversal.

This testimony was put in as tending to show that the plaintiff had received from the defendant a duplicate copy of the executed contract, its copy having been lost, plaintiff went more into the particulars tending to show such a contract had actually been returned to the plaintiff. However, late in the trial, at plaintiff's request, defendant produced the duplicate copy of the original contract dated January, 1907, duly signed by plaintiff and defendant.

EXCEPTION NO. 4 (Record, p. 105.)

Mr. Harding having identified certain specifications for the structural steel and iron of the eight-story office building and theatre in question, consisting of nineteen pages and having stated that he recognized them as being the specifications that his company was to work by under the contract and having stated that these were the specifications furnished his company by the American-Pacific Construction Company, they were offered in evidence. Mr. Humphrey objected to their admission in evidence and his objection was overruled. Thereupon he saved Exception No. 4.

These specifications are copied in the record, pages 105 to 124. Observe the testimony showed that the specifications so offered in evidence were the ones furnished plaintiff by the American-Pacific Construction Company to work by, and the trial court said:

> "We are only concerned here with what the witness testified to. The witness testified that those were the specifications they were to work by." (Record, p. 105.)

No reason is assigned why it was error to admit these specifications in evidence and it is inconceivable how it could be error to admit them. On every principle of law they were admissible.

EXCEPTION No. 5 (Record, p. 125).

Mr. S. B. Harding further testified:

> "After we received the contract we proceeded with the work of preparing drawings and ordering and fabricating steel. These drawings are here today and they were prepared by us after the contract in question was executed. They consist of 31 sheets on tracing cloth." (Record, p. 124.)

Here counsel for plaintiff on the taking of the deposition, said:

> "I will ask the Notary to mark these 'Plaintiff's Exhibit Detailed drawings A. B. etc., respectively. They are 31 sheets of details on tracing cloth offered as Exhibits A. B. etc., and then when the alphabet is exhausted, A-1, A-2, etc. There are 31 of these sheets and I now offer them in evidence.

MR. HUMPHREY: They are objected to as irrelevant, incompetent and immaterial, no contract having been established, and on the further ground that it does not appear that they are a part of the contract, or work undertaken by the plaintiff. (Record, pp. 124-125.)

The objection was overruled and exception taken, which exception was assigned as Exception No. 5.

The witness, continuing his testimony, says:

"These 31 sheets were drawn in reference to the Columbia Theatre Building for the American-Pacific Construction Company at the shop of plaintiff, and are part of the necessary work to be done to get out the tonnage.

Other testimony given in the case conclusively shows that it was not possible to get out this structural steel without first getting out these detailed drawings. (Record, p. 125.)

This evidence was admissible as showing the work already performed in carrying out this contract, and for the remaining part contracted for, but not then fabricated.

EXCEPTION No. 6 (Record, p. 128).

Exception 6 arose on an objection to the following question:

"Q. Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?

"MR. HUMPHREY: We object to that as being leading and calling for the conclusion of the witness.

"A. It did."

The witness continuing, says:

"Plaintiff had equipment for carrying out the contract and abundance of shop-room. I am familiar with the size of the building, the plans for the building, specifications and plans of the building known as the Columbia Theatre Building. I am a technical man." (Record, pp. 128-129.)

Now, surely the question was a proper one.

EXCEPTION NO. 7 (Record, p. 131).

Exception 7 relates to the court refusing to strike out a certain answer given by S. B. Harding in his deposition. The motion which the court refused to sustain reads:

"MR. HUMPHREY: We ask all the answer except the word 'Yes' be stricken from the record on the ground that it is not responsive, and merely attempts to relate a conversation, general in its terms, that it is alleged took place either with the architect for the owner of the property, and not for the defendant or with Mr. Vigus. The conversation is not binding on us."

Now counsel for defendant is in error, when he says the part asked to be stricken out, or no part was with Mr. Vigus. The witness' answer thus asked to be stricken out reads:

"and my reasons for that statement would be this: the American-Pacific Construction Company, through Mr. Vigus talked of 1400 tons; the architect and his engineer, talked of 1400 or 1500 tons, as I remember it. Now, the architect's plans I am speaking now of the original plans from which we made our detail drawings—were incomplete at the time we began work, and Mr. Smedberg came up for the purpose of completing these drawings, and in so far as we went in examining the original drawings prepared by the architect, we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit 'O,' calling attention to the discrepancies, and I, therefore, from such investigations, and discrepancies found, think that the building would run up to the 1500 ton mark, if not more, as these increases spoken of are 20 per cent or 25 per cent. Of course, this would not apply to all the structure." (Record, pp. 130-131.)

Obviously, if the defendant had carried out its contract and received from plaintiff all the structural steel the building required, then the actual number of tons would have been known. But as defendant breached the contract, the plaintiff had to prove in the best way it could the amount of tonnage it would have required if there had been no breach of the contract by the defendant.

Bearing on the quantity of structural steel that would have been required for the completion of the building,

had there been no breach of the contract, by the defendant, the attention of the court is called to the testimony of F. W. Harding, one of the officers of the Structural Steel Company, and a practical estimator of the quantity of steel required for a given structure. He testified:

> "My name is F. W. Harding, I am 41 years of age. My residence is Waukesha, Wisconsin, and I am Vice-President of the Modern Steel Structural Company of Waukesha, which office I have held for the past three months. Prior to that time I was Treasurer of the Company for five or six years. I believe I was elected Treasurer in 1907, at which time I was also directing Manager and one of the Board of Directors.
>
> "I am familiar with the contract that existed between the Modern Steel Structural Company and the American-Pacific Const. Co., and examined it critically and carefully the specifications and plans for the building in question known as the Columbia Theatre, and I can state very approximately that at least 1500 tons of steel would have been required to construct that building.
>
> "I have done a great deal in behalf of my company in taking contracts, although it never became part of my duty to remember quantities, but I was required to place valuations on work. The estimating of quantities would be done by our clerical force. I am familiar with this contract, and I am able to state that after the contract was executed by the defendant what plaintiff did to carry it out," etc. (Rec., pp. 182-183.)

Frederick Hoffman, a witness whose deposition was taken at Waukesha, testified:

"My name is Frederick Hoffman. I am forty-one years of age, and am a structural engineer by occupation. I reside at 220 Broadway, Waukesha, Wisconsin. I have been a structural engineer for five or six years past. I was educated in a technical school in Germany, and am now employed by the Modern Steel Structural Company of Waukesha, Wisconsin, where I have been employed between nine and ten years past. When I was first employed by that company, I was shop inspector, and for the last five or six years I have been structural engineer, and my duties in that capacity consist of making general plans of structural steel structures; making detail plans; writing up specifications and perhaps, occasionally checking detail plans for the company. To a certain extent I am familiar with the plans and specifications for the Columbia Theatre job at San Francisco, which came into the shop of the plaintiff early in January, 1907. At that time I knew, from the plans and specifications, the length, width and height of the building, and generally in regard to its dimensions. I had nothing to do with the making of the detail drawings.

"Q. From your examination of the drawings and specifications of the building, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre building in question?

* * * * * * *

"A. In my judgment, it would take in the neighborhood of 1500 tons. That would be a fair

estimate; I arrived at approximately 1500 tons of structural steel by my past experience, considering buildings of similar construction and size, and considering the plans and specifications and the City Ordinances of San Francisco, covering such buildings at that time. I had before me the City Ordinances and specifications. I have no interest in this litigation." (Record, pp. 176, 177, 178.)

EXCEPTION No. 8 (Record, p. 177).

Now, Exception No. 8 is based on the alleged error of the court in overruling defendant's objection to the following question propounded to Mr. Hoffman:

> "Q. From your examination of the drawings and specifications of the building, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?
>
> "MR. HUMPHREY: I object to that question, as it calls for opinion evidence."
>
> "The objection was overruled and exception taken, which exception defendant hereby designates as its Exception No. 8.
>
> 'WITNESS answered: "In my judgment it would take in the neighborhood of 1500 tons." "That would be a fair estimate."

Insomuch as the defendant breached the contract there was no other way whereby it could be shown the number of tons of steel that it would have taken had not the contract been breached by defendant.

EXCEPTION NO. 9 (Record, p. 181).

This exception relates to the court sustaining objection to the following question:

> "Q. With whom did you have that conversation?" (Meaning a conversation anti-dating the execution of the contract sued on.)

Surely the trial court committed no error, in sustaining such objection, since it was wholly irrelevant, incompetent and immaterial with whom he had a conversation. If the conversation had been gone into it might tend to vary or contradict the terms of the written contract which would not be proper. Where the written contract is finally executed by both parties, all previous colloquial is supposed to be merged in the contract.

EXCEPTION NO. 10 (Record, p. 233).

The tenth exception and assignment or error relates to the refusal of the court to sustain a demurrer to the evidence at the close of plaintiff's testimony. It would have been palpable error if the court had done so, because the evidence undeniably sustained every allegation of the second amended complaint. Moreover, if there had been merit in said demurrer defendant, by offering evidence after its demurrer was overruled, waived it.

Runkle v. *Burnham,* 153 U. S. 216;
Railroad Co. v. *Snyder,* 152 U. S. 684;
Railroad Co. v. *Hawthorne,* 144 U. S. 202;

ASSIGNMENTS OF ERROR 11 TO 33.

Defendant's assignments of error from 11 to 33 inclusive related to instructions given and refused by the court, but as no proper exceptions were taken as to these at the trial, they should have no consideration by this Court. These instructions given and refused have been considered in this brief.

ASSIGNMENT OF ERROR 34.

Assignment of error 34 (Record, p. 294) should not be sonsidered by this Court because it is not based on any proper exception saved at the trial.

ASSIGNMENT OF ERROR 35.

Assignment of error 35 should not be considered by this Court, because it is not based on any proper exception saved at the trial.

ASSIGNMENT OF ERROR 36.

Assignment of error 36 should be rejected because the court had a perfect right to permit the second amended complaint to be filed. Moreover, no exception was taken to the action of the court in permitting this to be done.

ASSIGNMENT OF ERROR 37.

The contentions of counsel for defendant that the court erred in overruling its demurrer to the second amended complaint is untenable for two reasons:

1st. Because the second amended complaint is formal, full, and explicit, and states a good cause of action in law.

2d. Because when defendant's demurrer was overruled, it saved no exceptions to the order of the court in overruling same, but filed its answer to the merits.

In Federal practice the doctrine is fundamental that filing a plea to the merits after a demurrer has been overruled operates as a waiver of the demurrer.

> *U. S.* v. *Boyd*, 5 How. 29;
> *Campbell* v. *Wilcox*, 10 Wall. 421;
> *Bell* v. *Mobile & Ohio R. R. Co.*, 4 Wall. 598;
> *Watkins* v. *U. S.*, 9 Wall. 759.

In the Campbell case, Justice Field, in writing the opinion of the court, said:

> "The filing of a plea to the merits after the demurrer was overruled, operated as a waiver of the demurrer. The pleading was thus abandoned and ceased thenceforth to be a part of the record." In *Campbell* v. *City of Haverhill*, 155 U. S. 610.

Justice Brown, in writing the opinion of the court, at page 613, said:

> "When a pleading is amended, the original pleading ceases to be a part of the record, because the party pleading having the power has elected to make the change; *Campbell* v. *Wilcox*, 77 U. S. 421, wherein this court held that the filing of a plea to the merits after a demurrer was overruled operated as a waiver of the demurrer." (Citing many Federal cases.)

Newcomb v. *Imperial Life Ins. Co.*, 62 Fed. 97;
City of Plankington v. *Gray*, 63 Fed. 415;
Gancert v. *Henry*, (Cal.) 33 Pac. 92;
San Diego County v. *Siefert*, (Cal.) 32 Pac. 644;

Indeed, this doctrine is fundamental and well established in the Federal practice.

FINALLY.

It is a fundamental rule in the Federal courts that where the verdict is right on the merits the judgment will not be reversed on account of errors in the instructions.

Waldron v. *Babbitt*, 16 Wall. 577;
Tua v. *Carriere*, 117 U. S. 207;
Stewart v. *Wyoming Cattle Ranch Co.*, 128 U. S. 383;
Railroad Co. v. *Ross*, 112 U. S. 377;
Bridge Co. v. *McGrath*, 134 U. S. 260;
West v. *Camden*, 135 U. S. 507;
Spalding v. *Castro*, 153 U. S. 39;
Hegler v. *Faulkner*, 153 U. S. 109;
McDermott v. *Severe*, 202 U. S. 600.

REPLY TO BRIEF OF PLAINTIFF IN ERROR.

The foregoing was prepared by Judge Taylor of the St. Louis bar, general counsel for the Modern Steel Structural Company, and necessarily in advance of the service of the brief of plaintiff in error. While it is felt that the statements of principle already made amply

cover the propositions discussed by opposing counsel, a few observations replying directly to some of the points discussed by counsel may perhaps lighten the labors of the Court in reaching its conclusion.

Appellant's counsel rely for reversal upon four propositions (Brief, p. 100):

First. There was no valid contract;

Second. There was no damage proved;

Third. There was a fatal variance between the allegations of the complaint and the proofs:

Fourth. The action was premature, as the alleged contract, if a contract, provided within its own terms the means of settling the very point involved in this action.

I.

It is claimed the contract declared upon is invalid because the drawings and specifications referred to therein are not attached thereto, or, as is probably meant by counsel, they were not sufficiently identified in the proofs made, as being the drawings and spcifications within the contemplation of the parties when the contract was executed.

So far as the specifications are concerned it would seem that they are sufficiently identified by the caption:

> Specifications. The Structural Steel and Iron of an Eight Story Office Building Theatre to be erected on the Southeast corner of Van Ness Avenue & Geary St., for The Richelieu Realty Syndicate, San Francisco, Cal.

"Frank T. Shea, Architect, San Francisco.

"Joseph D. Smedberg, Consulting Engineer, San Francisco.

"San Francisco, December 21, 1906."

Especially is this so in view of the correspondence between the parties leading up to the execution of the contract, wherein it appears that two copies of the specifications had been forwarded by defendant to plaintiff (Record, p. 86), one of which copies was returned to defendant by plaintiff with its proposed contract of January 4, 1907, and referred to therein as being identified with marks "Copy No. 1" initialed "S. B. H. 12-30-06." It is true the copy retained by plaintiff did not bear these identification marks, yet had defendant at the trial furnished the Court its copy of these specifications when it produced the original contract it cannot be doubted that such copy would have exhibited the marks in question. Moreover, the copy of the specifications in evidence was proved to be a copy of the one furnished to defendant with the proposal of January 4th (Record, pp. 86, 104, 105).

There can be no question as to the identity of the drawings mentioned in the evidence as being the drawings referred to in the contract as furnished and to be furnished by J. D. Smedberg. There is not in the record the slightest intimation from counsel that the drawings constantly being referred to in the evidence were not those within the contemplation of the contract. Had the proofs failed in this respect the situa-

tion should have been met by a motion on defendant's part to strike from the record the contract and all evidence relating thereto. Had such a motion been made the plaintiff would have been permitted, if necessary, to introduce further evidence on the subject.

As we do not understand that counsel has taken the extreme position that a contract, such as the one under discussion, is void at its inception irrespective of what might be considered by them a sufficient identification of the drawings and specifications, we shall make no effort to reply to such a contention.

II.

To counsel's criticism that no damage was proved we may add.

The quantity and quality of the steel to be fabricated were sufficiently indicated in the specifications, and also in the drawings which had been prepared in advance of the execution of the contract, to form the basis of an estimation of damages occasioned by defendant's breach thereof. While it is not claimed that mathematical accuracy was possible in fixing the precise amount and character of the fabricated article, a reasonably accurate estimate thereof was practicable by "cubing" the structure whose dimensions were known.

> "If we know the dimensions of a building we know from experience what that building will weigh, if we know the cubic foot rule." (Testimony F. W. Harding, Record, p. 225.)

"We do not need to see the size of the material to know what the weight of the structure would be." (Same witness, Record, pp. 227, 228.)

"Q. You would not be able to state what character of steel or truss or members would be required until the design was prepared by the architect, would you?

"A. Yes, you would by knowing what the city ordinances were. If you were designing a building to comply with those city ordinances you would know what they would be. In this case we would take our instructions from the engineer.

"Q. You would not know what the engineer intended to design for the theater?

"A. He would not get very far out of the way. The drawings have not all been prepared, but those that have been prepared are an indication of the whole, and they are my only information except the general drawings that I saw on one visit to San Francisco, in Mr. Shea's office. They gave me a general impression of the whole work.

"Q. But no designs as far as the theatre was concerned was ever prepared?

"A. No detailed drawings." (Same witness, Record, p. 255.))

Even defendant's witness Galloway (Record, p. 248) states that the method of obtaining the weight of a building by "cubing" is the general method. The witness qualifies the effect of this admission by stating that the method is not accurate. It is not contended that the method is scientifically exact, but simply that it is

reasonably approximate for the purpose of estimating damages in a case such as this.

The quantity and quality of the work to be performed under the contract in this case, must have been understood with reasonable definiteness by the parties thereto, as bids were called for on a pound basis (see Specifications, Record, p. 107, lines 19, 20) and accepted before all the drawings had been prepared. The circumstance that the American Pacific Construction Company had already entered into a contract with The Richelieu Realty Syndicate for the construction of the entire building, would seem sufficiently persuasive of the fact that a reasonable approximation of what was to be done thereunder was determinable from the plans in existence at the time the contract under review was awarded plaintiff. It would seem, therefore, that the "cubing method" of estimating weights in such a building was, by the owners and contractors in this line of business, deemed reasonably accurate and sufficiently practical, and further that the expense of fabrication averages up with such approximate uniformity, that the plans and specifications of the building then drawn furnished a reasonably accurate basis for a bid for the work to be done. This being so the evidence submitted to the jury as to the damage suffered by the plaintiff was certainly sufficiently definite to enable them to intelligently assess the amount thereof. This being especially so after defendant had abandoned its agreement and closed upon plaintiff the door to a more accurate

determination of the amount of work called for by the contract. The law will not permit a party thus to take shelter behind his own unlawful act. Defendant seeks here to escape by the plea that it is not possible to determine the exact amount of material to be fabricated, owing to the absence of the drawings, when his own unlawful act has taken from plaintiff the very means adopted for this purpose by the parties. As illustrative of this situation, see *Seymour* v. *Oelrichs,* 156 Cal. 782 l. c. 802, 803. This was an action by an employee under a contract for a term of years, seeking damages for an unlawful discharge.

> "The rule is invariably applied in cases of personal injury, where the jury is permitted, in the assessment of damages, to consider evidence bearing not alone upon the immediate but upon the future effect of the injury upon the complaining party. Nor is the rule disturbed by the argument, advanced by the appellants, that it is impossible to determine with accuracy what damage plaintiff would actually suffer during the remainder of the unexpired term. It is to be conceded that the question of the extent of the future damage which a complaining party in a case like the one at bar would suffer is fraught with some difficulty. Yet it hardly rests with the defendants to complain of such difficulty, since it arises only through the wrongful act of the defendants themselves."

The plans and detailed drawings of the office portion of the buildings were, without doubt, practically finished April 8, 1907, at the time plaintiff was ordered

to stop work under the contract. March 26, 1907, plaintiff writes to defendant:

> *"We shall send you framing plans in a very short time for the office portion of the building up to and including the seventh floor."* (Record, p. 130.)

And on April 3rd also advises defendant:

> *"As to the plans we have everything agreed upon satisfactorily up to the eighth floor. . . . You, of course, understand that all of the above applies only to the part or office portion of the building."* (Record, p. 226.)

Counsel lays stress upon plaintiff's apparent inconsistency in making diversified claims of damage, at different stages of the case. Such a situation arose from the statement of an erroneous theory of recovery in the earlier complaints filed in this action. This erroneous theory was abandoned in the Second Amended Complaint, which stated the true basis of recovery.

Counsel undertakes to demonstrate by a method asserted to be conclusive, that plaintiff could have made not only no profit in the execution of the contract in question, but would actually have lost money thereby. We are promised this accomplishment by reference solely to the testimony of the witnesses for defendants in error. A rather boastful promise, and one which seems to have been soon forgotten, as we find counsel under the apparent necessity of relying, in his demonstration, not only upon the testimony of Briete, Snyder and Zucco, defendant's witnesses, but also of ignoring certain important features of the evidence of plaintiff's

witnesses, which latter evidence alone was to accomplish plaintiff's undoing.

Referring now to the statement found on pages 93, 94 and 95 of appellant's brief, and adopting. for the moment, the basis upon which the estimates therein are made, i. e., the quantity of the steel for fabrication as 1200 tons, and counsel's estimate of the shop cost and drawing cost of the work up to the time of defendant's order to stop work under the contract, we have the following criticisms to offer:

As to the drawing cost:

At the time work was stopped $669.28 had been paid out for this item of expense. While the material sheets produced (prepared for the purpose of ordering material) covered only 256 tons of steel, the detailed drawings must have had reference to a much larger tonnage, as the plans for the office portion of the building, for a period of several days prior to the stoppage of the work, had, as we have just seen, been pretty well framed up, and owing to the fact that in an office building the structural work of each floor is practically the same, most of the detail drawings which were gotten out for the first floor would serve equally well for the others above, with the possible exception of the eighth floor. It is safe to say that the expense of the drawing work for the office portion of the building had practically all been taken care of. This statement is in effect borne out by the testimony of S. B. Harding (Record, p. 223), stating that in his judgment the number of detailed

drawings of the building would be from 75 to 80. This estimate was given February 12, 1907, when the witness's judgment was uncolored by financial interest and given under circumstances which would naturally have tended rather to exaggerate the number of drawings than to lessen it. It will be remembered that the number prepared was 31. If the estimate of counsel is to prevail, it would have taken 310 detailed drawings to have furnished the structual steel of the building.

The statement that 50 per cent in weight of the building belongs to the theatre portion is a serious error.

(See testimony F. W. Harding, Record, pp. 253, 254.)

"Q. Mr. Harding, what part of the drawings for a theatre building proper, the average theatre building, presents intricacies in drawings?

"A. This building is a theatre and office building. The open space that is indicated on those plans is not filled with a lot of work. The only way that that work can be averaged with the whole is to consider what part of the theater work is difficult work. The office portion and store portion is plain work. The difficult part of the work that some stress has been laid on is a very small proportion of the whole work. To answer the question directly, I would say from forty to fifty per cent of the building, according to this open space, would be occupied by the theatre. That would be just a comprehensive view; it might be thirty per cent, or it might be 50 per cent. The tonnage that would be apportioned to the bulk of the building, as I stated

yesterday, I believe would not exceed twenty per cent of the whole work in the building. To make myself clear on that, theatres are not all alike. It depends upon what duplication there is. In this particular case, there is considerable duplication. I should say, that for the portion of the theatre work, five dollars a ton is not out of the way for the cost of drawings for that part of the whole structure.

"Q. What tonnage would it take for that?

"A. Well, I should say twenty per cent of the whole tonnage of the building would be that class of work."

So that on the basis of a 1200-ton building we would have the structural steel weight distributed as follows: to the office portion 960 tons and to the other portion 240 tons.

Counsel's claim for generous treatment in his analysis, in that he is only charging $4.10 per ton for the detailed drawings of the theatre portion, when F. W. Harding had stated it might be $5.00, becomes more apparent than real, when we find him adding per ton in this statement $4.10 to $6.00 and over, which had already therein been charged in the figures $6,692.80 as the total drawing cost; making nearly $10.00 per ton for the theatre drawing details, a figure largely in excess of that named by defendant's most enthusiastic witness.

Assuming as correct the basis taken by counsel for his statement, it should be amended as follows:

Shop Cost:

Office part, 960 tons at $8.00	$ 7,680.00
Theatre part, 240 tons at $12.00	2,680.00

Drawing Cost:		
Office part, approximately		669.28
Theatre part, 240 tons at $5.00		1,100.00
Freight		18,000.00
Steel cost		45,600.00
		$75,729.28
1200 tons of steel at $77.00		$92,400.00
Total cost as above		75,729.28
Profit		$16,670.72
Interest 7% from April 8, 1907, to September 18, 1912, date of judgment, 5½ years, 38½ per cent		6,317.50
Amount damage		$22,988.22
On basis of 1500 tons steel add 25%		5,747.00
		$28,735.22
From which the following deductions should be made (Record, pp. 154, 155):		
Paint	$375.00	
Coal	162.00	
Fuel oil	72.00	
Paint brushes	50.00	
Punches	35.00	
Depreciation	160.00	854.00
Leaving still as damages estimated on general basis adopted by ~~plaintiff~~ defendant for a 1500-ton building		$27,881.22

III.

VARIANCE.

This has been fully covered in former part of the brief.

IV.

Action as being prematurely brought:

The case of *Holmes* v. *Richet,* 56 Cal. 312, cited by counsel, seems to us to conclusively negative counsel's contention on this point.

In conclusion we wish to say that much of the brief on behalf of plaintiff in error, it seems to us, has been devoted to a discussion of the effect of the evidence, practically as to whether it is sufficient to justify the verdict in this case. While we have appreciated that, upon the record, such a discussion was not in order, we have trespassed somewhat along the same lines in following our opponent's lead, in order that a false coloring should not be given to the case on its merits. The only approach to the right to discuss the evidence, which counsel may have had under his assignments of error, can be found in his exceptions to the denial of defendant's motion for non-suit. Even here such a discussion is precluded by the necessity for the denial of the motion, as plaintiff was concededly entitled to a judgment for the amount of steel fabricated and delivered to defendant under the contract.

Respectfully submitted,

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